EX PARTE OR LATE FILED

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January 5, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

RE: CC Docket No. 98-147.

Dear Ms. Salas:

Please accept two copies of the Ex Parte Comments of NorthPoint Communications regarding the Commission's Notice of Proposed Rulemaking Concerning Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

Sincerely,

Ruth M. Milkman

EX PARTE OR LATE FILED

NORTHPOINT
COMMUNICATIONS

January 5, 1999

Mr. Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, D.C. 20554

Re: CC Docket 98-147

Dear Mr. Strickling:

As you know, NorthPoint and several other parties to the Advanced Services proceeding have argued that the ILECs should be required to provide "spectrum unbundling," i.e., that CLECs should be permitted to provide data services on lines on which the ILEC separately provides POTS service. In response, the ILECs have raised a host of legal and technical objections. As discussed below, NorthPoint believes these objections are entirely meritless.

1. The Commission has the Authority to Mandate Spectrum Unbundling.

The Telecommunications Act provides that the ILECs must provide unbundled access to network elements "at any technically feasible point." 47 U.S.C. § 251(c)(3). Bell Atlantic has argued that spectrum unbundling is not required if a competing carrier could provide the services through some other means. Bell Atlantic December 23, 1998 ex parte at 4 (CC Docket 98-147). This is simply wrong. The Commission explicitly rejected this argument in the Local Competition Order,[1] stating that the "necessary" and "impair" standards do not mean that unbundling is unnecessary if a competing carrier could obtain the element from another source. Local Competition Order at ¶ 283; *Iowa Utils. Bd v. FCC*, 120 F.3d 753, 810-812 (8th Cir 1997). Instead, the Commission concluded that unbundling is required whenever denial of access to a nonproprietary element would decrease the quality or increase the cost, *Iowa Utils. Bd.*, 120 F.3d at 812 & n. 31, or that without access to a particular proprietary element a carrier's ability to compete would be significantly impaired or thwarted, i.e., "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service increases." Local Competition Order at ¶ 205, aff'd by *Iowa Utils. Bd.*, 120 F.3d at 810-812.

[1] Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 385 (1996) ("Local Competition Order").

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Apparently conceding this may be the appropriate analysis, Bell Atlantic then argues that there is no evidence that the cost of providing unbundled access to "some of the spectrum on a loop is less than the cost of providing access to an entire loop, including all the spectrum." Bell Atlantic December 23, 1998 ex parte at 5 (CC Docket 98-147). This is simply absurd. While there may be some incidental nonrecurring costs involved in spectrum unbundling (such as provisioning the splitter), these costs are dwarfed by the efficiencies of using one loop rather than two. Indeed, the most obvious - and compelling -- evidence of the potential cost savings with loop sharing is that virtually every ILEC providing xDSL is doing so over a shared loop. This gives ILECs an enormous advantage over competing providers. This is most evident in the residential market, where competitive providers are unable to compete effectively if they are forced to purchase a second loop in order to provide advanced services. Residential consumers are looking for xDSL service in the $40 price range. However, in seventeen of NorthPoint's first eighteen markets, the loop-specific costs (non-recurring and recurring) and collocation costs exceed 100 percent of this $40 price point. See NorthPoint November 24, 1998 ex parte, (CC Docket 98-147). The ILECs' refusal to permit spectrum unbundling increases competing providers' costs of providing xDSL to the point of making residential competition cost-prohibitive. Under the Act, therefore, the ILECs are required to provide unbundled access to the loop spectrum to the extent technically feasible.

Finally, several ILECs have argued that paragraph 385 of the Local Competition Order states that unbundled loop spectrum does not qualify as a network element and, more specifically, that the local loop is a single network element. *See, e.g.*, SBC Comments, September 25, 1998 (CC Docket No. 98-147); Bell Atlantic December 23, 1998 ex parte at 2-4 (CC Docket 98-147). These arguments are entirely misplaced. In paragraph 385, the Commission concluded that flexibility would be maximized if one carrier were given entire control over the loop, since "a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others. For example, carriers wishing to provide solely voice-grade service over a loop would preclude another carrier's provision of a digital service, such as ISDN or ADSL, over that same loop." Local Competition Order at ¶ 385. The Commission's conclusion thus rested on a presumption that, as technical matter, voice and data services cannot be provisioned on the same line. Making this point explicit, the Commission stated that "[d]igital services such as ISDN and ADSL occupy the same frequency spectrum on a loop as an ordinary voice-grade services."[2] Today, however, advances in technology have made it possible for a loop to be used simultaneously for voice and xDSL services. In fact, several ILECs currently offer ADSL service on the very same loop over which they provide POTS service. The Commission plainly has the authority to require spectrum unbundling: The Local Competition Order explicitly stated that "we have authority to identify additional, or perhaps different unbundling requirements that would apply to ILECs in the future. The rapid pace and ever changing nature of technological advancement in the

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[2] Local Competition Order, 11 FCC Rcd 15499, at n. 833.

telecommunications industry makes it essential that we retain the ability to revise our rules as circumstances change." Local Competition Order at ¶ 246. In light of this technological development -- as evidenced by the ILECs' ability to offer data and voice services over the same loop -- this Commission should require spectrum unbundling of the local loop.

2. Spectrum Unbundling is Technically and Operationally Feasible.

The fact that the ILECs are providing POTS and data services over the same line demonstrates that such an arrangement is technically feasible. Indeed, the ILECs have conceded as much in both the Technical Forum sponsored by this Commission as well as in written submissions. See, e.g., SBC July 30, 1998 ex parte (CC Docket 98-147) (*see* attached) (conceding that "spectrum unbundling is technically feasible). ILECs offering xDSL and voice service on the same line split off the data traffic and deliver it to the ILEC DSLAM. There is no technical reason why the ILEC could not instead send the data traffic to a competing provider's DSLAM located elsewhere in the central office.

Several ILECs, however, have raised a host of billing, accounting and other operational difficulties as evidence that spectrum unbundling should not be required. These objections are misplaced, however, since this Commission has concluded - and the Eighth Circuit has affirmed - that "[a] determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site, concerns." 47 C.F.R. § 51.5; *Iowa Utils. Bd.*, 120 F.3d at 810.

Moreover, as discussed in greater detail below, these alleged difficulties are vastly overstated and are no different than a host of other difficulties that have been resolved through the negotiation process. SBC, for instance, cites "administrative and record difficulties," presumably issues such as accounting and billing concerns. SBC July 30, 1998 ex parte (CC Docket 98-147) (*see* attached). Bell Atlantic objects on the grounds that "having two carriers provide service over different portions of the loop will require extensive coordination between them that will necessarily increase the cost of such things as billing and maintaining the loop." Bell Atlantic December 23, 1998 ex parte at 6 (CC Docket 98-147). SBC also cites "trouble reporting and intrusive problems," SBC July 30, 1998 ex parte (CC Docket 98-147), while Bell Atlantic cites "maintenance issues" as well as concerns over "standards and spectrum management." See Bell Atlantic December 23, 1998 ex parte at 12-14 (CC Docket 98-147). Neither company, however, is able to explain how these administrative, maintenance and trouble reporting issues differ in any material way from ILEC/CLEC operational issues that have been successfully resolved in connection with existing UNEs. Each of these UNEs raised operational issues and required the development or modification of administrative, billing, maintenance and trouble reporting systems.

NorthPoint, for instance, currently provides xDSL service using unbundled loops purchased from the ILECs. If a problem develops, NorthPoint must coordinate the repair of that

service with both the end-user and the ILEC (and often with yet another party, the ISP). Similar processes could be developed between the ILECs and the CLECs to deal with the administrative aspects of loop sharing, just as they were developed for access to other UNEs. For instance, spectrum unbundling would require the ILEC to keep accounts and bill CLECs, just as it already does for multiple types of UNEs. To the extent accounting and billing processes associated with spectrum unbundling increase administrative costs for accounting, billing and loop maintenance, as Bell Atlantic alleges, these costs will be reflected in the cost of the shared loop. Operational issues such as trouble reporting, loop testing and maintenance problems also can be resolved through ILEC/CLEC negotiation, just as they are today. Negotiations also can be used to resolve the ILECs' alleged concerns over what happens when an end user subscribing to an ILEC's voice service and a competing provider's data service over the same loop terminates their voice service: For instance, the competing provider could either terminate the data service or pick up the entire cost of the loop.

NorthPoint recently discussed the issue of spectrum unbundling in a conference call with ILEC subject matter experts. During these conversations, the ILEC technical experts, when pressed, were unable to muster a single issue that would make spectrum unbundling technically or operationally unfeasible. Actual marketplace experience also demonstrates that the ILECs' objections to spectrum unbundling are vastly overstated. DSL-provider MachOne apparently is actively conducting spectrum unbundling trials with incumbent LEC Citizens Communications. See DATA December 1, 1998 ex parte at 4-5 (CC Docket 98-147). Accordingly, NorthPoint urges the Commission to find that spectrum unbundling is in the public interest. Any outstanding operational issues can be resolved through ILEC/CLEC negotiations to be completed within three months of the Commission's order.

3. Public Policy Supports Spectrum Unbundling.

Contrary to Bell Atlantic's contentions, Bell Atlantic December 23 ex parte at 8-14 (CC Docket 98-147), public policy necessitates spectrum unbundling. Bell Atlantic contends, for instance, that spectrum unbundling will discourage investment in competing local exchange facilities. Id. at 8. But as the Commission has recognized, some markets may not "efficiently support duplication of all, or even some, of the ILEC's facilities. Access to unbundled network elements in these markets will promote efficient competition for local exchange services." Local Competition Order at ¶ 232. Accordingly, spectrum unbundling will promote the Commission's announced goal of providing carriers with "the maximum flexibility to offer new services," Local Competition Order at ¶ 385.[3]

[3] If the Commission does not mandate spectrum unbundling for all ILECs, it should adopt a parity-based approach. For example, if an ILEC uses spectrum unbundling to offer voice and DSL over the same loop, that would create a strong presumption that spectrum unbundling is technically feasible and should be offered to CLECs.

Bell Atlantic's contention that spectrum unbundling will freeze technological development is equally misplaced. Bell Atlantic December 23, 1998 ex parte at 9 (CC Docket 98-147). Far from "freezing" technological development, spectrum unbundling will promote it by allowing competing providers to compete on equal terms with the ILECs. In fact, it is Bell Atlantic's policy of refusing access to shared loops that freezes technological development by requiring competing providers to compete using a more costly second loop. By increasing competing providers' costs, the ILECs are stifling competition in advanced services, to the detriment of all Americans.

Finally, there is absolutely no merit to Bell Atlantic's contention that spectrum unbundling will do nothing to create local exchange competition. As described above, to date, competitive providers' deployment of advanced services to residential customers has been stymied by high loop costs and the ILECs' refusal to allow loop sharing. So long as competing providers are required to use a separate loop to provide xDSL services, they will be hard-pressed to compete in the residential market in most states. By requiring spectrum unbundling, this Commission can strike a blow for competition and further the 1996 Act's goal of "secur[ing] lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." For these reasons, NorthPoint urges the Commission to require spectrum unbundling.

Sincerely yours,

Steven Gorosh/RY

Steven Gorosh
Vice-President & General Counsel

Cc: Kathryn Brown
Tom Power
Jim Casserly
Kyle Dixon
Paul Gallant
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Bill Rogerson
Patrick de Graba
Don Stockdale
Jonathan Askin
Stagg Newman
Jordan Goldstein

Ex PARTE HANDOUT
7/30/98

RETAIL & RESOLD LOCAL EXCHANGE vs UNEs

- Retail POTS sold directly to an end user
  - ILEC responsible for performance of the service through the switch all the way to the NID (to the minimum point of entry(MPOE) under the FCC's rules) at the end user's premises
    - ILEC deals with and is responsible to the end user (purchaser of the retail POTS)
    - ILEC bills the end user purchaser

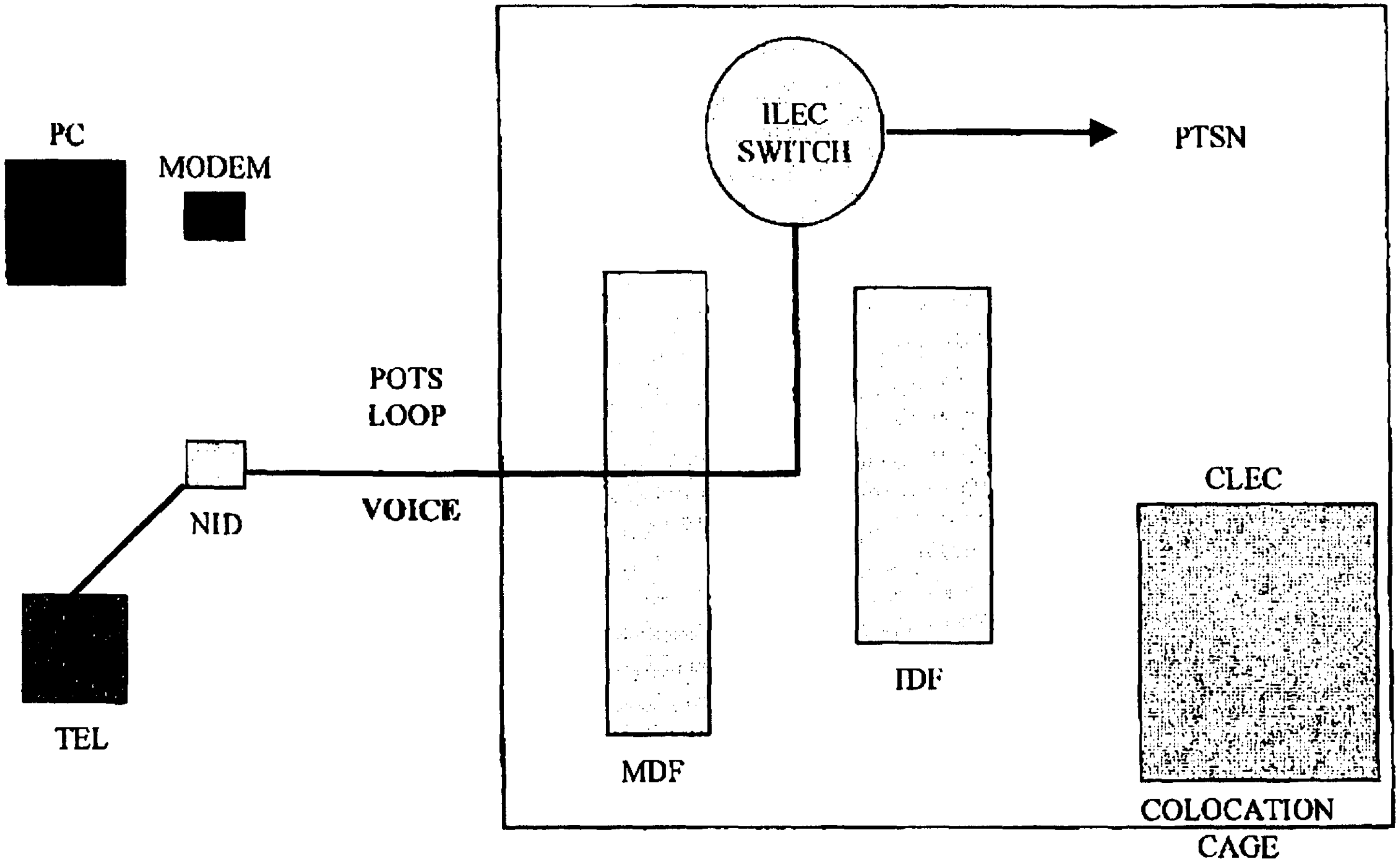
- Resold POTS sold to a CLEC (not interconnection but POTS sold at discount)
  - ILEC responsible for performance of the service through the switch all the way to the NID (same as above – retail POTS)
    - ILEC deals with and is responsible to the CLEC (purchaser of the resold POTS), and not the end user
    - ILEC bills the CLEC for the resold service
  - CLEC brands the resold service as <u>its</u> service
    - CLEC deals with and is responsible to the end user purchaser
    - CLEC bills the end user purchaser

- UNEs sold to a CLEC (same as interconnection)
  - ILEC responsible for the performance of individual components (UNEs) only, not for a group of UNEs combined by the CLEC or CLEC service
    - ILEC deals with and is responsible to the CLEC and only for UNEs that ILEC provides
    - ILEC bills the CLEC for the UNEs provided
  - CLEC puts together components (UNEs)from various sources and sells telecommunications service under <u>its</u> brand
    - CLEC deals with and is responsible to the end user purchaser
    - CLEC bills the end user purchaser

SPECTRUM UNBUNDLING

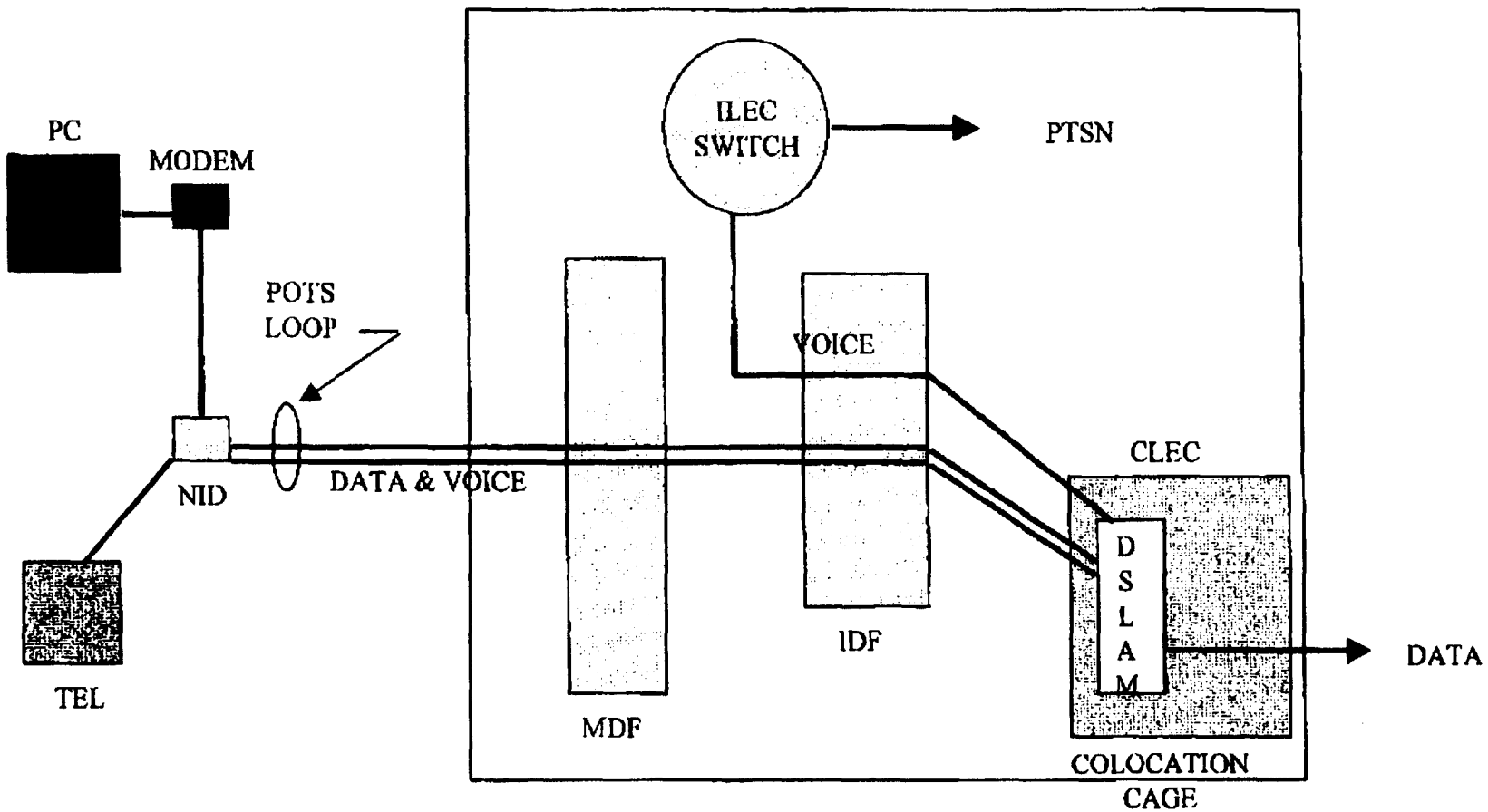
- Definition: Spectrum Unbundling is when one entity (e.g., ILEC) provides service (e.g., Local Exchange - POTS) over its facilities (e.g., copper pair) utilizing a specific frequency band and makes a different frequency band available to a second entity (e.g., CLEC) over these same facilities so the second entity can provide a simultaneous service (e.g., ADSL).
- Spectrum Unbundling is technically feasible but is impractical in today's network
  - administrative & record difficulty
  - trouble reporting & intrusive testing problems
  - mixes retail and interconnection
- ILEC retail and resold POTS should not be required to be spectrum unbundled
- CLECs can provide ADSL and their own POTS with UNEs
  - can use UNE loop to carry voice and data to their collocated equipment
  - can use UNE loop and UNE switch to provide POTS and ADSL

ILEC RETAIL & RESOLD LOCAL EXCHANGE - POTS



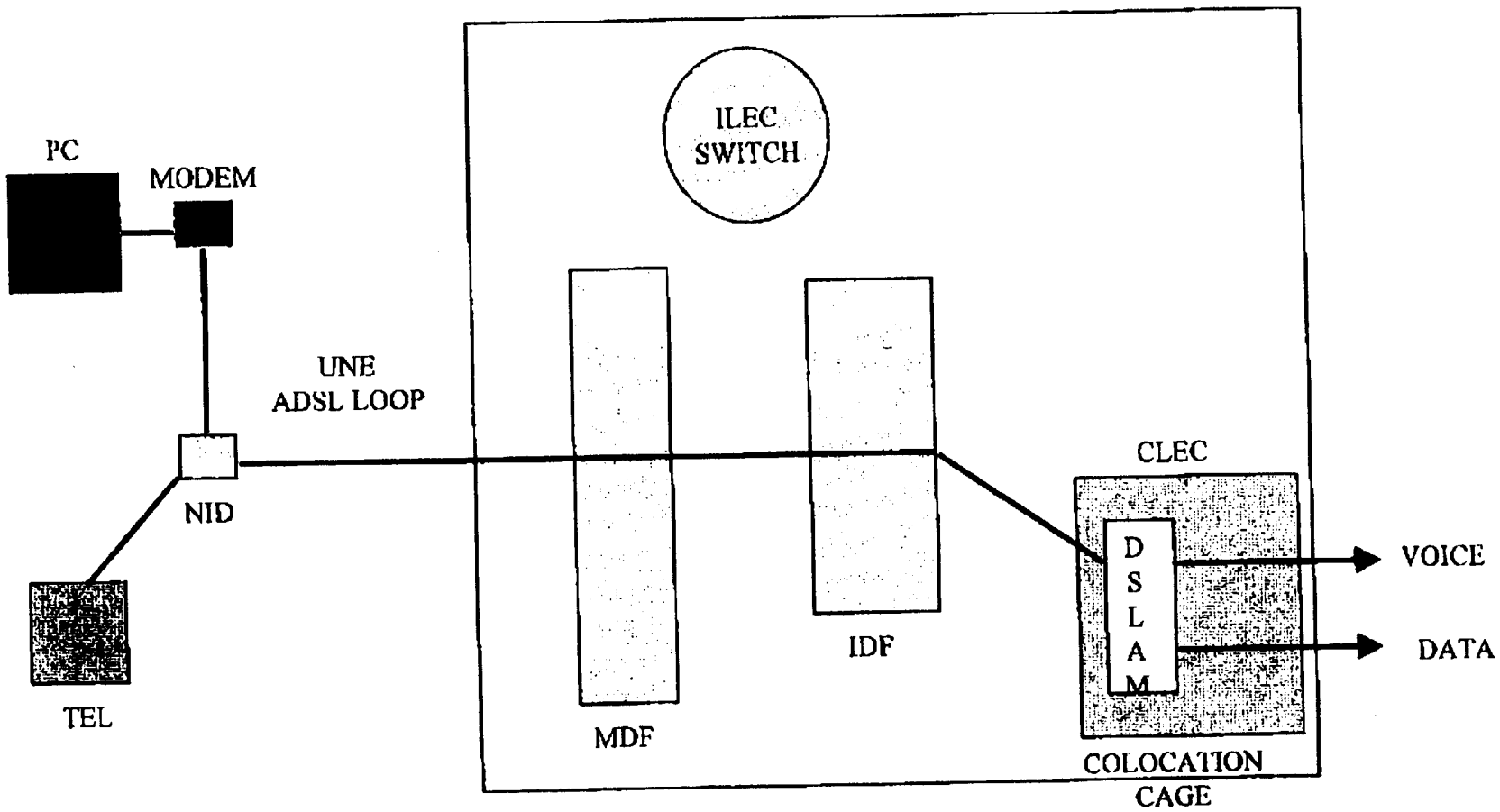
ILEC RESPONSIBLE FOR SERVICE FROM NID THRU TO ILEC SWITCH

SPECTRUM UNBUNDLING
CLEC ADSL OVER ILEC POTS



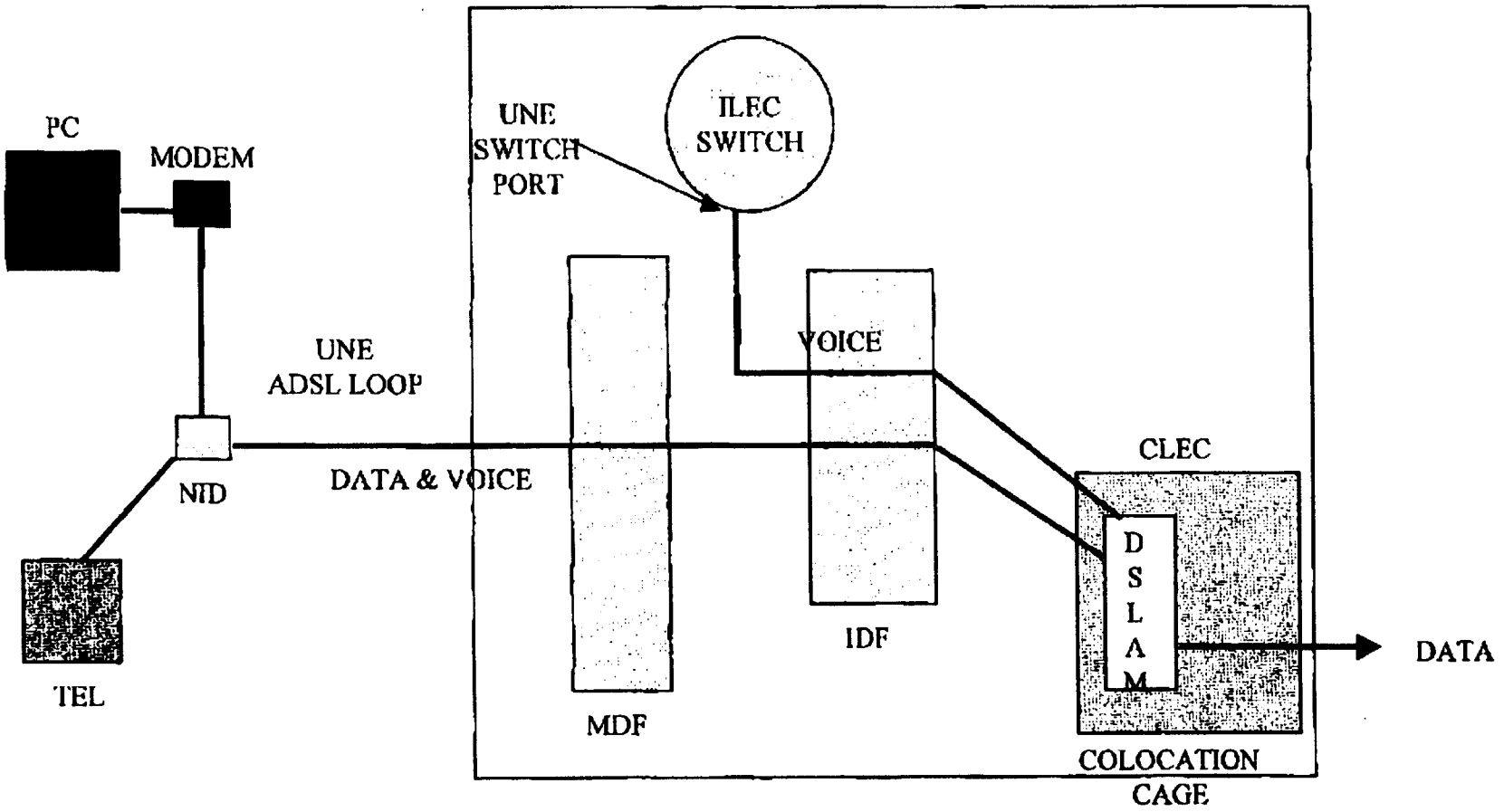
ILEC CANNOT SUPPORT POTS SVC
SINCE IT GOES THRU CLEC DSLAM
(NO ACCESS TO DSLAM)

CLEC ADSL & POTS OVER UNE LOOP



ILEC RESPONSIBLE FOR UNE LOOP

CLEC ADSL & POTS OVER UNE SWITCH AND UNE LOOP



ILEC RESPONSIBLE FOR ONLY UNES,
NOT FOR END-TO-END POTS